

NOTICE OF MODIFICATION OF PROPOSED REGULATIONS

California Code of Regulations Title 2, Administration Division 1, Administrative Personnel

DATE: May 17, 2002

TO: ALL STATE AGENCIES AND EMPLOYEE ORGANIZATIONS

SUBJECT: WHISTLEBLOWER RETALIATION REGULATIONS

Under the authority established in Government Code Section 18701, and pursuant to Government Code Section 11346.8(c), the State Personnel Board (SPB) is providing notice of changes that are being considered regarding the above-named regulations, which were the subject of a public hearing held on February 7, 2002. As a result of oral and written comments received, parts of the regulations have been modified. These modifications also reflect amendments made to the originally proposed regulations as a result of changes to the Education Code that became effective on January 1, 2002.

Copies of the full text of the regulations as originally proposed and as modified are attached for your information. SPB's rulemaking file on the proposed action is open to public inspection by appointment Monday through Friday, from 8:00 a.m. to 5:00 p.m., at 801 Capitol Mall, Room 555, Sacramento, CA 95814.

WRITTEN PUBLIC COMMENT PERIOD:

The public comment period for written comments will close on June 3, 2002, at 5:00 p.m. Any person may submit written comments about the proposed modifications. To be considered by SPB, written comments must be received by Bruce Monfross at the State Personnel Board, P.O. Box 944201, Sacramento, CA 94244-2010, before the close of the written comment period. During the written comment period, written comments may also be e-mailed to Bruce Monfross at bmonfross@spb.ca.gov or faxed to (916) 653-4256.

Modification of Whistleblower Retaliation Regulations
May 17, 2002
Page Two

CONTACT PERSON:

Please contact Bruce Monfross at (916) 653-1403 or TDD (916) 653-1498 for additional information regarding this action. The backup agency contact for this action is Steve Unger at the State Personnel Board, P.O. Box 944201, Sacramento, CA 94244-2010, (916) 651-8461 or TDD (916) 653-1498. Questions regarding the substance of these regulations should be directed to the contact person. Questions regarding the regulatory process in conjunction with these regulations should be directed to the backup contact person.

Mike Willihnganz
Chief, Policy Division

Attachments: Texts of Regulations as Originally Proposed and as Modified

NOTE: THESE REGULATIONS HAVE BEEN CONSIDERABLY REVISED SINCE THEY WERE HEARD AT THE FEBRUARY 7, 2002, MEETING OF THE STATE PERSONNEL BOARD. EACH PAGE OF THE REVISED REGULATIONS HAS THE WORDS "WHISTLEBLOWER RETALIATION 2" AT THE BOTTOM.

Regulations Governing Whistleblower Retaliation Complaints

All new text is indicated by underline.

Title 2. ADMINISTRATION

Division 1. Administrative Personnel

Chapter 1. State Personnel Board

§ 56. Whistleblower Retaliation Complaint Process.

Any state employee or applicant for state employment, or any employee or applicant for employment with a California Community College, who believes that he or she has been retaliated against in employment for having reported improper governmental activity, as that phrase is defined in Government Code Section 8547.2(b), or Education Code Section 87162(c), or for having refused to obey an illegal order or directive, as defined in Government Code Section 8547.2(e) or Education Code Section 87162(b), may file a complaint and/or appeal with the Board in accordance with the provisions set forth in §§ 56.1 – 56.8. For purposes of complaints filed by community college employees or applicants for community college employment, the local community college district shall be deemed the "appointing power."

NOTE: Authority cited: Section 18701, Government Code.

Reference: Sections 87162 and 87164, Education Code; and Sections 8547.2, 8547.8 and 19683, Government Code.

§ 56.1. Requirements for Filing Whistleblower Retaliation Complaints with the Appeals Division of the Board.

An individual desiring to file a complaint of retaliation with the Board must adhere to all of the following requirements:

(a) Prior to filing his or her complaint with the Board, the complainant shall comply with all other filing requirements, if applicable, set forth in Government Code Section 19683.

(b) The complaint shall be filed with the Appeals Division within one year of the most recent alleged act of reprisal.

(c) All complaints shall be in writing.

(d) Each complaint shall:

(1) Identify the facts that form the basis of the complaint, including, but not limited to: the improper governmental activity that the complainant reported, or the illegal order or directive the complainant refused to obey; the date the complainant reported the improper governmental activity, or refused to obey the illegal order or directive; the person(s) to whom the complainant reported the improper governmental activity, or to whom the complainant stated that he or she would not obey the illegal order or directive; the improper personnel action, as defined in Government Code Section 8547.3(b) or Education Code Section 87163(b), that the complainant experienced as a result of reporting the improper governmental activity, or refusing to obey an illegal order or directive; the date on which the improper employment action occurred; and all information that the complainant possesses that shows that the improper employment action occurred as a result of the complainant's report of improper governmental activity, or refusal to obey the illegal order or directive.

(A) For purposes of this section, "improper personnel action" includes, but is not limited to, promising to confer, or conferring, any benefit; effecting, or threatening to effect, any reprisal; or taking, or directing others to take, or recommending, processing, or approving, any personnel action, including, but not limited to, appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action; as well as intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command the complainant, for the purpose of interfering with the complainant's rights conferred pursuant to applicable statutes.

(2) Include as attachments all non-privileged documents, records, declarations, and other information in the complainant's possession, custody, or control that are relevant to the complaint of retaliation.

(3) Include as an attachment a list of all documents or records relevant to the complaint of retaliation that are not in the complaining party's possession, custody, or control, but which he or she reasonably believes to be in the possession, custody, or control of the appointing power or any individually named respondent to the complaint.

(4) Identify all respondents known to the complainant (i.e., the appointing power as well as all state civil service or community college employees alleged to have retaliated against the complainant), and identify the business address of each respondent named as a party to the complaint.

(5) Have attached any complaints of retaliation previously filed with the appointing power concerning the same retaliatory acts alleged in the complaint filed with the Board, and a copy of the written response of the appointing power to the complaint, if such response has been provided to the complainant. If the appointing power provides a written response to any such previously filed complaint of retaliation to the

complainant after the complaint has been filed with the Appeals Division, the complainant shall file a copy of any response with the Appeals Division within 5 days of receipt of the written response.

(6) Specify the relief and/or remedies sought, including any compensatory damages sought.

(7) If adverse action is sought against any individually named respondent, pursuant to the provisions of Government Code Section 19574, the complaint must clearly state the facts constituting the cause or causes for adverse action in such detail as is reasonably necessary to enable the accused employee to prepare a defense thereto. If the material facts alleged are not within the personal knowledge of the complainant, the complaining party may be required to present supporting affidavits from persons having actual knowledge of the facts before acting upon the request for adverse action. Any failure to comply with the provisions of this section shall constitute a waiver on the part of the complainant to subsequently seek disciplinary action against any individually named respondent.

(8) Include a sworn statement, under penalty of perjury, that the contents of the written complaint are true, or believed by the complainant to be true.

(9) Be limited to a maximum of 15 pages of double-spaced typed or printed text. Additional pages may be allowed upon a showing of good cause. The complainant shall submit a separate document with the complaint stating the reasons for good cause. The 15-page limit does not apply to any documents attached to the complaint pursuant to the requirements of subdivisions (2), (3), or (5) of this section, or any other exhibits.

(e) The above procedures do not apply in those cases where an appellant raises retaliation as an affirmative defense when appealing a notice of adverse action, pursuant to the provisions of Government Code Section 19575; when appealing a notice of rejection during probation, pursuant to the provisions of Government Code Section 19175; when appealing a notice of medical action, pursuant to the provisions of Government Code Section 19253.5; or when appealing a notice of non-punitive action, pursuant to the provisions of Government Code Section 19585.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Section 87164, Education Code; Sections 8547.3, 8547.8, 18670, 18671, 18675, 19175, 19253.5, 19572, 19583.5, 19585 and 19683, Government Code; and Section 6129, Penal Code.

§ 56.2. Acceptance of Whistleblower Complaint; Notice; Findings of the Executive Officer.

(a) Within 10 working days of receipt of the complaint, the Appeals Division shall initiate an investigation to determine if the Board has jurisdiction over the complaint and to determine if the complainant meets the filing requirements set forth in Section 56.1. The Appeals Division shall also determine if the complainant has

complied with all other requirements for filing a retaliation complaint, as set forth in Government Code Sections 8547-8547.12 and 19683 and/or Education Code Sections 87160-87164; and Section 56.1 of these regulations.

(b) If the Appeals Division determines that all filing requirements have not been satisfied concerning the filing of a retaliation complaint, the Appeals Division shall notify the complaining party in writing that the complaint has not been accepted and the reason(s) for that determination. The complaining party shall be permitted to file an amended complaint within **15 working** days of receipt of the notice of non-acceptance of the complaint.

(c) Within **10 working** days of receipt of the amended complaint, the Appeals Division shall initiate an investigation to determine if the Board has jurisdiction over the amended complaint, and to determine if the amended complaint meets the filing requirements set forth in Section 56.1. For purposes of determining the one-year limitation period, the date that the original complaint is filed with the Board shall be deemed the filing date for the amended complaint. If the Appeals Division determines that all filing requirements have not been satisfied concerning the filing of the amended complaint, the Appeals Division shall notify the complaining party in writing that the amended complaint has been rejected and the reason(s) for that determination.

(d) If the Appeals Division determines that the Board may exercise jurisdiction over the complaint or amended complaint, and that all requirements have been satisfied concerning the filing of a retaliation complaint, and that the complainant has established a prima facie case of retaliation, the Appeals Division shall notify the complaining party in writing that the complaint has been accepted. The Appeals Division shall also serve a copy of the complaint or amended complaint on all respondents named in the complaint or amended complaint. For purposes of effecting service of process of the complaint or amended complaint on the appointing power, such service may be accomplished by mailing a copy of the complaint or amended complaint, with a proof of service attached, to the business address of the executive in charge of the Department, Agency, District or Board, and/or to the Legal Office of the appointing power. For purposes of effecting service of process of the complaint or amended complaint on the individually named respondents, such service may be accomplished by mailing a copy of the complaint or amended complaint, with a proof of service attached, to the business address of each individually named respondent.

(e) Within **20 working** days after service of notice of acceptance of the complaint, each named respondent shall file with the Appeals Division and serve on all named parties a written response to the complaint. The written response shall include specific and detailed factual information that refutes the complainant's allegations, and shall include all non-privileged documents, records, declarations, and other information in the respondent's possession, custody, or control that are relevant to the complaint of retaliation. Each written response shall have attached a proof of service. Service of the response may be accomplished by mailing a copy of the reply to both the Appeals Division and the home or business address of the complaining party. Each written response shall be limited to no more than 15 pages of double-spaced typed or printed text. Additional pages may be allowed upon a showing of good cause. The respondent shall submit a separate document with the response stating the reasons for good cause.

The 15-page limit shall not apply to those documents attached to the response as exhibits. The Appeals Division may grant an extension of time in which to file a written response to the complaint upon a showing of good cause by the requesting party.

(f) If the complainant desires to file a written reply to the written response(s) submitted by the named respondent(s), he or she shall file the reply with the Appeals Division and serve a copy of the reply on all named parties to the complaint within **10 working** days after service of the response(s) of the named respondent(s). Each written reply shall have attached a proof of service. Service of the reply may be accomplished by mailing a copy of the reply to the Appeals Division and the business address of each named respondent. Each written reply shall be limited to no more than 10 pages of double-spaced typed or printed text. Additional pages may be allowed upon a showing of good cause. The complainant shall submit a separate document with the reply stating the reasons for good cause. The 10-page limit shall not apply to those documents attached to the reply as exhibits. The Appeals Division may grant an extension of time in which to file a written reply to any response received concerning the complaint upon a showing of good cause by the complainant. The Appeals Division may, in its sole discretion, condition the granting of any such request for an extension of time upon the complainant's agreement to extend the 60 working day requirement for the issuance of a Notice of Findings for a period of time commensurate with the extension of time granted to the complainant to submit his or her written reply.

(g) Upon acceptance of any written responses, the Appeals Division shall continue its investigation, with or without a hearing, pursuant to Government Code Sections 8547-8547.12 and 19683. In conducting the investigation, the Appeals Division may require any party to the complaint to submit whatever other information it deems necessary to investigate the complaint. For purposes of this section, "party to the complaint" is limited to the complaining party and/or any respondent named in the complaint.

(h) In those instances where any party to the complaint requests, pursuant to this section, that the appointing power produce records or documents relevant to the complaint, and the appointing power asserts a privilege or exemption as to the records or documents requested, the following procedure shall apply:

(1) Within **5 working** days of the appointing power invoking a privilege or exemption concerning the requested records or documents, either the requesting party or the appointing power may submit notice of the issue in writing to the State Personnel Board, Chief Administrative Law Judge, for resolution. The party submitting the matter to the Chief Administrative Law Judge shall notify the non-moving party, both telephonically and in writing, that the matter has been submitted for review by the Chief Administrative Law Judge, on the same date that the issue is submitted to the Chief Administrative Law Judge for review.

(2) The requesting party and the appointing power and/or other named respondent shall submit written briefs to the Chief Administrative Law Judge, concerning the disputed documents, and indicating why the disputed documents should or should not be produced. Any such brief shall be filed within **5 working** days of the date that notice of the dispute is first submitted to the Chief Administrative Law Judge.

(3) Except as set forth in subsection (4) of this subdivision, when submitting its brief concerning the disputed records or documents, the appointing power shall include a copy of the disputed records or documents for purposes of an in camera review by the Chief Administrative Law Judge, or his or her designee.

(4) In those cases where the appointing power and/or other named respondent declines to produce the requested documents for purposes of an in camera review on the grounds that such disclosure is not required by law, the appointing power shall cite the specific legal authority that renders the disclosure improper.

(5) The Chief Administrative Law Judge, or his or her designee, shall issue his or her decision concerning the disputed documents within **5 working** days of receipt of the parties written briefs.

(6) If any party to the dispute disagrees with the decision of the Chief Administrative Law Judge, or his or her designee, they may file a petition for writ of mandate in the superior court, seeking an interlocutory review of that decision.

(7) The 60-working-day period for the issuance of the Notice of Findings by the Executive Officer shall be tolled pending the resolution of any such dispute concerning the requested documents.

(i) Within **60 working** days of service of the Board's notice of acceptance of the complaint, the Executive Officer shall issue and serve on the complainant and each named respondent a Notice of Findings concerning the complaint of retaliation, unless the 60-working-day period has been waived or tolled under subdivisions (f) or (h) of this section.

(j) In those cases where the Executive Officer concludes that the complainant failed to prove the allegations of retaliation by a preponderance of the evidence, the Notice of Findings shall, except in those instances where the findings address jurisdictional and/or procedural matters, specifically refer to the information offered both in support of, and in opposition to, each allegation contained within the complaint.

(k) In those cases where the Executive Officer concludes that the complainant proved one or more of the allegations of retaliation by a preponderance of the evidence, the Notice of Findings shall identify the allegations deemed substantiated, and the named respondents deemed to have engaged in retaliatory acts toward the complainant. The Notice of Findings shall also, except in those instances where the findings address jurisdictional and/or procedural matters, specifically refer to the information offered both in support of, and in opposition to, each allegation contained within the complaint. If it is determined that any individual manager, supervisor, or other state civil service employee engaged in improper retaliatory acts, the Notice of Findings shall indicate the legal causes for discipline under of Government Code Section 19572, and the remedies, if any, recommended by the Executive Officer, including, but not limited to, the appropriate disciplinary action to be taken against any individual found to have engaged in retaliatory conduct.

(l) In those cases where the Executive Officer concludes that material questions of fact exist concerning whether the complainant established retaliation for having engaged in whistleblowing activities, the Executive Officer may, in his or her sole discretion, assign the case to an evidentiary hearing before a Board Administrative Law Judge.

(m) The Notice of Findings shall inform each named party of his or her respective right to file a Petition for Hearing Before the Board, pursuant to the provisions of Section 56.3 and/or Section 56.4. However, in those cases where the Executive Officer issues a Notice of Findings assigning the matter to an evidentiary hearing pursuant to the provisions of subdivision (l), no party to the complaint shall be entitled to file either a Petition for Hearing before the Board, nor a Petition for Order of Remedies.

NOTE: Authority cited: Section 18701, Government Code.

Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18675, 19572, 19574, 19575, 19683 and 19590, Government Code; and Section 6129, Penal Code.

§ 56.3. Petition for Hearing by Complainant Before the Board.

(a) If the Notice of Findings concludes no retaliation occurred, the complainant may file a Petition for Hearing before the Board.

(b) A Petition for Hearing under this Section shall be filed with the Executive Officer and served on each named respondent(s) to the complaint within 30 days of service of the Notice of Findings. The Petition for Hearing must include a copy of the Notice of Findings. Service may be accomplished by mailing a copy of the Petition for Hearing, with a proof of service attached, to the business address of each named party to the complaint.

(c) Each Petition for Hearing shall be in writing and identify the facts that form the basis for the request, but shall be limited to those allegations, issues, defenses, or requests for relief raised in the written pleadings filed during the Notice of Findings process. Any allegation, issue, defense, or request for relief not raised in the written pleadings during the Notice of Findings process shall be deemed waived, except upon petition and determination by the Board of good cause.

(d) Each respondent named in the complaint shall be permitted an opportunity to submit a written opposition to the Petition for Hearing. Any written opposition to the Petition for Hearing shall be filed with the Board and served on the complainant no later than 20 days after the date the Petition for Hearing was served on the respondent.

(e) In reviewing any such Petition for Hearing, the Board shall determine whether the Notice of Findings conforms to the requirements of Section 56.3(c), and whether the Notice of Findings is supported by substantial evidence.

(f) If the Petition for Hearing is denied, the Board shall issue a Decision that adopts the findings of the Executive Officer as its own decision in the matter.

(g) If the Petition for Hearing is granted by the Board, the Board shall issue a resolution rejecting the findings of the Executive Officer and assign the matter to an administrative law judge, who shall conduct an evidentiary hearing in accordance with those statutes and regulations governing the conduct of Board evidentiary hearings, and issue a Proposed Decision for the Board's review and consideration.

(h) The evidentiary hearing shall be based solely on those allegations, issues, defenses, and requests for relief raised by the parties in the written pleadings during the Notice of Findings process, except in those cases where the Board has determined, pursuant to subdivision (c) of this section, that good cause exists to permit the moving party to amend the pleadings. Any document submitted by any party as an attachment or exhibit to the written pleadings during the Notice of Findings process shall not be considered by the administrative law judge during the evidentiary hearing, unless each document is first introduced and deemed to be relevant and admissible evidence by the administrative law judge during the course of the evidentiary hearing. Each named respondent shall have the right to be represented by a legal representative of his or her own choosing during the hearing, and to present a defense to the allegations contained in the complaint, separate and apart from the defense presented by any other named respondent.

(i) The Board may, in its sole discretion, adopt, reject, or modify the Proposed Decision. If the Board rejects the Proposed Decision, the parties shall be afforded an opportunity to present written and/or oral argument to the Board at a date, time, and location designated by the Board, after which time the Board shall issue its own decision concerning the matter.

NOTE: Authority cited: Section 18701, Government Code.

Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18675, 19582, 19583.5 and 19683, Government Code; and Section 6129, Penal Code.

§ 56.4. Petition for Hearing by Respondents Before the Board.

(a) Any named respondent found in the Notice of Findings to have engaged in retaliatory conduct may file a Petition for Hearing before the Board.

(b) A Petition for Hearing must be filed with the Executive Officer and served on each named party to the initial complaint within **30** days of service of the Notice of Findings. The Petition for Hearing must include a copy of the Notice of Findings. Service may be accomplished by mailing a copy of the Petition for Hearing, with proof of service attached, to the home or business address of each named party to the complaint.

(c) Each Petition for Hearing shall be in writing and identify the facts that form the basis for the request, but shall be limited to those allegations, issues, defenses, or requests for relief raised in the written pleadings filed during the Notice of Findings process. Any allegation, issue, defense, or request for relief not raised in the written pleadings during the Notice of Findings process shall be deemed waived, except upon petition and determination by the Board of good cause.

(d) The complainant shall be permitted an opportunity to submit a written opposition to the Petition for Hearing. Any written opposition to the Petition for Hearing shall be filed with the Board no later than **20** days after the date the Petition for Hearing was served on the complainant.

(e) In reviewing any such Petition for Hearing, the Board shall determine whether the Notice of Findings conforms to the requirements of Section 56.4(c), and whether the Notice of Findings is supported by substantial evidence.

(f) If the Petition for Hearing is denied, the Board shall issue a Decision that adopts the findings of the Executive Officer as its own decision in the matter.

(g) If the Petition for Hearing is granted by the Board, the Board shall issue a resolution rejecting the findings of the Executive Officer and assigning the matter to an administrative law judge, who shall conduct an evidentiary hearing in accordance with those statutes and regulations governing the conduct of Board evidentiary hearings, and issue a Proposed Decision for the Board's review and consideration.

(h) The evidentiary hearing shall be based solely on those allegations, issues, defenses, and requests for relief raised by the parties in the written pleadings during the Notice of Findings process, except in those cases where the Board has determined, pursuant to subdivision (c) of this section, that good cause exists to permit the moving party to amend the pleadings. Any document submitted by any party as part of the written pleadings during the Notice of Findings process shall not be considered by the administrative law judge during the evidentiary hearing, unless each document is first introduced and deemed to be relevant and admissible evidence by the administrative law judge during the course of the evidentiary hearing. Each named respondent shall have the right to be represented by a legal representative of his or her own choosing during the hearing, and to present a defense to the allegations contained in the complaint, separate and apart from the defense presented by any other named respondent.

(i) The Board may, in its sole discretion, adopt, reject, or modify the Proposed Decision. If the Board rejects the Proposed Decision, the parties shall be afforded an opportunity to present written and/or oral argument to the Board at a date, time, and location designated by the Board, after which time the Board shall issue its own decision concerning the matter.

(j) Any Decision issued by the Board in accordance with this section shall be deemed a final decision of the Board, and the individual against whom any disciplinary action is taken as a result of that Decision shall not have any right of further appeal to the Board concerning that action, with the exception of a Petition for Rehearing.

NOTE: Authority cited: Section 18701, Government Code.

Reference: Section 87164, Education Code; Sections 8547.8, 11513, 18670, 18671, 18672, 18675, 19575, 19582, 19590, 19592 and 19683, Government Code; and Section 6129, Penal Code.

§ 56.5. Decision Adopting the Notice of Findings.

If no Petition for Hearing is received pursuant to the provisions of Section 56.3 or 56.4, the Notice of Findings shall be deemed to be the Board's final Decision in the matter, and no named party to the action shall be deemed to have any right of further appeal to the Board, with the exception of a Petition for Rehearing.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Sections 18671.1 and 19582, Government Code.

§ 56.6. Disciplinary Action for Proven Retaliatory Acts.

(a) In those cases where the Board issues a Decision that finds that any manager, supervisor, or other state civil service employee has engaged in improper retaliatory acts, the Board shall order the appointing authority to place a copy of the Board's Decision in that individual's official personnel file. The Decision shall set forth the legal causes for discipline under Section 19572, and a statement of the penalty imposed on the individual. The appointing authority shall place the Decision in the individual's official personnel file within 30 days of the issuance of the Board's Order and shall also, within that same time period, notify the Office of the State Controller of the disciplinary action taken against the individual. The appointing authority shall also, within 40 days of the issuance of the Board's Order, notify the Board that it has complied with the provisions of this subdivision.

(b) In those cases where the Board issues a Decision that finds that any community college administrator, supervisor, or public school employer has engaged in improper retaliatory acts, the Board shall order the appointing authority to place a copy of the Board's Decision in that individual's official personnel file. The appointing authority shall place the Decision in the individual's official personnel file within 30 days of the issuance of the Board's Order and shall also, within 40 days of the issuance of the Board's Order, notify the Board that it has complied with the provisions of this subdivision.

(c) Any Decision, as described in subdivision (a), shall be deemed a final decision of the Board, and the individual against whom the disciplinary action was taken shall not have any further right of appeal to the Board concerning that action, with the exception of a Petition for Rehearing.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18675, 18710, 19572, 19574, 19582, 19583.5, 19590, 19592 and 19683, Government Code; and Section 6129, Penal Code.

§ 56.7. Consolidation with Other Hearings.

(a) In those cases where an appeal from adverse action, rejection during probationary period, medical action, or non-punitive action is consolidated with a whistleblower retaliation complaint, and the whistleblower retaliation complaint identifies specifically named individuals against whom adverse action is sought pursuant to the

provisions of Section 56.1(d)(7), each individually named respondent shall have the right to participate in the consolidated hearing in such a manner as to reasonably defend him or herself against the allegations contained in the whistleblower retaliation complaint, to the same extent that he or she will be permitted to defend him or herself against such allegations in those cases where the whistleblower retaliation complaint has not been consolidated with any other action. These rights shall include, but not be limited, to the right to:

(1) be represented by a representative of his or her own choosing during the consolidated hearing;

(2) present a defense on his or her own behalf concerning the allegations and issues raised in the whistleblower retaliation complaint, separate and apart from any defense presented by the appointing power or any other named respondent;

(3) conduct pre-hearing discovery concerning allegations and issues raised in the whistleblower retaliation complaint;

(4) examine and cross-examine witnesses concerning allegations and issues raised in the whistleblower retaliation complaint;

(5) introduce and challenge the introduction of evidence concerning allegations and issues raised in the whistleblower retaliation complaint; and

(6) present oral and/or written argument to the decision-maker concerning allegations and issues raised in the whistleblower retaliation complaint.

(b) In those cases where one or more individually named respondents have been joined in the consolidated hearing, the administrative law judge may, in his or her discretion, make such orders as may appear just in order to prevent any named respondent from being embarrassed, delayed, or put to undue expense, and may order separate hearings or make such other order as the interests of justice may require.

NOTE: Authority cited: Section 18701, Government Code.

Reference: Sections 8547.8, 11513, 18670, 18671, 18672, 18675, 19175, 19253.5, 19575, 19582, 19585, 19590 and 19683, Government Code.

§ 56.8. Discovery.

The discovery provisions set forth in Sections 57-57.4 shall apply to this section.

NOTE: Authority cited: Section 18701, Government Code.

Reference: Section 87164, Education Code; and Sections 8547.8, 18671, 18672, 18672.1, 18673, 18675 and 19683, Government Code.

NOTE: THESE REGULATIONS WERE HEARD AT THE FEBRUARY 7, 2002, MEETING OF THE STATE PERSONNEL BOARD AND HAVE SINCE BEEN CONSIDERABLY REVISED. THEY ARE BEING DISTRIBUTED AT THIS TIME SOLELY FOR THE PURPOSE OF COMPARISON. EACH PAGE OF THESE INITIALLY PROPOSED REGULATIONS HAS THE WORDS "WHISTLEBLOWER RETALIATION" AT THE BOTTOM.

Regulations Governing Whistleblower Retaliation Complaints

All new text is indicated by underline. A double underline with italics indicates new text that is intended to be single underlined in the final printing.

Title 2. ADMINISTRATION

Division 1. Administrative Personnel

Chapter 1. State Personnel Board

§ 56. Whistleblower Retaliation Complaint Process.

Any person who believes that he or she has been retaliated against in state employment for having reported improper governmental activity, as that phrase is defined in Government Code Section 8547.2(b), or for having refused to obey an illegal order or directive, as defined in Government Code Section 8547.2(e), may file a complaint and/or appeal with the Board in accordance with the provisions set forth in Sections 56.1-56.7. The discovery provisions set forth in Sections 57.1-57.4 shall be applicable to whistleblower retaliation complaints that are assigned to an evidentiary hearing before a Board administrative law judge.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Sections 8547.8 and 19683, Government Code.

§ 56.1. Requirements for Filing Whistleblower Retaliation Complaint with the Appeals Division of the Board.

An individual desiring to file a complaint of retaliation with the Board must adhere to the following requirements:

(a) Prior to filing his or her complaint with the Board, the complainant shall comply with all other filing requirements, if any, set forth in Government Code Section 19683.

(b) The complaint shall be filed with the Appeals Division within one year of the most recent alleged act of reprisal.

(c) The complainant shall serve a copy of the complaint of retaliation, and all accompanying documents, on his or her appointing power, and on each named employee alleged to have retaliated against the complainant, on or before the same date that he or she files his or her complaint with the Appeals Division. Service shall be made in accordance with the provisions of Section 51.2(f).

(d) All complaints shall be in writing.

(e) Each complaint shall:

(1) identify the facts that form the basis of the complaint, including, but not limited to: the improper governmental activity that the complainant reported, or the illegal order or directive the complainant refused to obey; the date the complainant reported the improper governmental activity, or refused to obey the illegal order or directive; the person(s) to whom the complainant reported the improper governmental activity, or to whom the complainant stated that he or she would not obey the illegal order or directive; the adverse personnel action, as defined in Government Code Section 8547.3(b), the complainant experienced as a result of reporting the improper governmental activity, or refusing to obey an illegal order or directive; the date on which the adverse employment action occurred; and all information that the complainant possesses that shows that the adverse employment action occurred as a result of complainant's report of improper governmental activity, or refusal to obey the illegal order or directive;

(2) include as attachments all non-privileged documents, records, declarations and other information in the complainant's possession, custody, or control that are relevant to the complaint of retaliation;

(3) include as an attachment a list of all documents or records relevant to the complaint of retaliation that are not in the complaining party's possession, custody, or control, but which he or she reasonably believes to be in the possession, custody, or control of the appointing power or any individually named respondent to the complaint;

(4) identify all respondents known to the complainant (i.e., the appointing power as well as all state employees alleged to have retaliated against the complainant);

(5) have attached any complaints of retaliation previously filed with the appointing power concerning the same retaliatory acts alleged in the complaint filed with the Board, and a copy of the written response of the appointing power to the complaint, if such response has been provided to the complainant. If the appointing power provides a written response to any such previously filed complaint of retaliation to the complainant after the complaint has been filed with the Appeals Division, the complainant shall file a copy of any response with the Appeals Division within 5 days of receipt of the written response;

(6) specify the relief and/or remedies sought, including the disciplinary action, if any, requested against any individual alleged to have retaliated against the complainant;

(7) include a sworn statement, under penalty of perjury, that the contents of the written complaint are true, or believed by the complainant to be true, prior to filing his or her complaint with the Board, if required to do so by statute;

(8) have attached a Proof of Service indicating that the complainant has served a copy of the complaint on the appointing power and all other named respondents in accordance with the provisions of Section 51.2(f); and

(9) be limited to no more than 15 pages in length, except upon a showing of good cause as to why additional pages are needed. The 15-page limit does not apply to any documents attached to the complaint pursuant to the requirements of subsections (2), (3), or (5) of this section.

(f) The above procedures do not apply in those cases where an appellant raises retaliation as an affirmative defense when appealing a notice of adverse action, pursuant to the provisions of Government Code Section 19575, or when appealing a notice of rejection during probation, pursuant to the provisions of Government Code Section 19175.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Sections 8547.8 and 19683, Government Code.

§ 56.2. Acceptance of Whistleblower Complaint; Notice; Findings of the Executive Officer.

(a) Within 10 working days of receipt of the complaint, the Appeals Division shall initiate an investigation to determine if the Board has jurisdiction over the complaint and to determine if the complainant meets the filing requirements set forth in Section 56.1. The Appeals Division shall also determine if the complainant has complied with all other requirements for filing a retaliation complaint, as set forth in Government Code Sections 8547 et seq. and 19683, and Section 56.1.

(b) If the Appeals Division determines that all filing requirements have not been satisfied concerning the filing of a retaliation complaint, the Appeals Division shall notify the parties in writing that the complaint has not been accepted and the reason(s) for that determination. The complaining party shall be permitted to file an amended complaint within 15 working days of receipt of the notice of non-acceptance of the complaint. Within 10 working days of receipt of the amended complaint, the Appeals Division shall initiate an investigation to determine if the Board has jurisdiction over the complaint and to determine if the complaint meets the filing requirements set forth in Section 56.1. For purposes of determining the one year limitation period, the date that the original complaint is filed with the Board shall be deemed the filing date for the amended complaint. If the Appeals Division determines that all filing requirements have not been satisfied concerning the filing of the amended complaint, the Appeals Division shall notify the parties in writing that the amended complaint has been rejected and the reason(s) for that determination. If the Appeals Division determines that all

requirements have been satisfied concerning the filing of a retaliation complaint, or an amended retaliation complaint, and that the complainant has established a prima facie case of retaliation, the Appeals Division shall notify the parties in writing that the complaint has been accepted.

(c) Within 15 *working* days after service of notice of acceptance of the complaint, each named respondent shall file with the Appeals Division and serve on all named parties a written response to the complaint. The written response shall include all non-privileged documents, records, declarations and other information in the respondent's possession, custody, or control that are relevant to the complaint of retaliation. Each written response shall have attached a Proof of Service. Each written response shall be limited to no more than 15 pages, except upon a showing of good cause as to why additional pages are needed. The 15-page limit shall not apply to those documents attached to the response as exhibits. The Appeals Division may grant an extension of time in which to file a written response to the complaint upon a showing of good cause by the requesting party.

(d) If the complainant desires to file a written reply to the written response(s) submitted by the named respondent(s), he or she shall file the reply with the Appeals Division and serve a copy of the reply on all named parties to the complaint within 10 *working* days after service of the response(s) of the named respondent(s). Each written reply shall have attached a Proof of Service. Each written reply shall be limited to no more than 10 pages, except upon a showing of good cause as to why additional pages are needed. The 10-page limit shall not apply to those documents attached to the reply as exhibits. The Appeals Division may grant an extension of time in which to file a written reply to any response received concerning the complaint upon a showing of good cause by the complainant. The Appeals Division may, in its sole discretion, condition the granting of any such request for an extension of time upon the complainant's agreement to extend the 60 *working* day requirement for the issuance of

a Notice of Findings for a period of time commensurate with the extension of time granted to the complainant to submit his or her written reply.

(e) Upon acceptance of any written responses, the Appeals Division shall continue its investigation, with or without a hearing, pursuant to Government Code Sections 8547 et seq and 19683. In conducting the investigation, the Appeals Division may require any party to the complaint to submit whatever other information it deems necessary to investigate the complaint.

(f) In those instances where any party to the complaint requests, pursuant to this Section, that the appointing power produce records or documents relevant to the complaint, and the appointing power asserts a privilege or exemption as to the records or documents requested, the following procedure shall apply:

(1) Within 5 *working* days of the appointing power invoking a privilege or exemption concerning the requested records or documents, either the requesting party or the appointing power may submit the issue to the State Personnel Board Chief Administrative Law Judge for resolution;

(2) The requesting party and the appointing power shall submit written briefs to the Chief Administrative Law Judge, concerning the disputed documents, and indicating why the disputed documents should or should not be produced. Any such brief shall be filed within 5 *working* days of the date that the dispute is first submitted to the Chief Administrative Law Judge;

(3) Except as set forth in subsection (4) of this section, when submitting its brief concerning the disputed records or documents, the appointing power shall include a copy of the disputed records or documents for purposes of an in camera review by the Chief Administrative Law Judge, or his or her designee;

(4) In those cases where the appointing power declines to produce the requested documents for purposes of an in camera review on the grounds that such disclosure is not required by law, the appointing power shall cite the specific legal authority that renders the disclosure improper;

(5) The Chief Administrative Law Judge, or his or her designee, shall issue his or her decision concerning the disputed documents within 5 *working* days of receipt of the parties written briefs;

(6) If any party to the dispute disagrees with the decision of the Chief Administrative Law Judge, or his or her designee, they may file a petition for writ of mandate in the superior court, seeking an interlocutory review of that decision;

(7) The 60 *working* day period for the issuance of the Notice of Findings by the Executive Officer shall be tolled pending the resolution of any such dispute concerning the requested documents.

(g) Within 60 *working* days of service of the Board's notice of acceptance of the complaint, the Executive Officer shall issue and serve on complainant and each named respondent a Notice of Findings concerning the complaint of retaliation, unless the 60 *working* day period has been waived or tolled under subsections (d) or (f) of this section.

(h) The Notice of Findings shall contain findings on the allegations contained in the complaint and shall state which, if any, of the allegations contained within the complaint are deemed substantiated, as well as which, if any, of the named respondents are deemed to have engaged in improper retaliatory acts toward the complainant. Except in those instances where the findings address jurisdictional and/or procedural matters, the Notice of Findings shall specifically refer to the information offered both in support of, and in opposition to, each allegation contained within the complaint. If it is determined that any manager, supervisor, or other state civil service employee engaged in improper retaliatory acts, the Notice of Findings shall indicate whether the misconduct violated any provisions of Government Code Section 19572. The Notice of Findings shall also inform the parties of all remedies, if any, recommended by the Executive Officer in order to rectify any substantiated retaliatory conduct, including the appropriate disciplinary action to be taken against any individual found to have engaged in retaliatory conduct toward the complainant. The Executive

Officer may also, in his or her sole discretion, recommend that the complaint be assigned for an evidentiary hearing before a Board Administrative Law Judge.

(i) The Notice of Findings shall inform each named party of his or her respective right to file a Petition for Hearing Before the Board, pursuant to the provisions of Section 56.3 and 56.4, or a Petition for Order of Remedies, pursuant to the provisions of Section 56.5.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Sections 8547.8 and 19683, Government Code.

§ 56.3. Petition for Hearing by Complainant Before the Board.

(a) If the Notice of Findings finds no actionable retaliation occurred, the complainant may file a Petition for Hearing before the Board.

(b) Any complainant desiring to file a Petition for Hearing under this Section must file the petition with the Executive Officer and serve a copy of the Petition for Hearing on each respondent(s) to the complaint within 30 days of service of the Notice of Findings.

(c) Each Petition for Hearing shall be in writing, identify the facts that form the basis for the request, include the Notice of Findings, and have attached a Proof of Service indicating that the complainant has served a copy of the Request for Hearing on each respondent(s) to the complaint.

(d) In reviewing any such Petition for Hearing, the Board shall determine whether the Notice of Findings conforms to the requirements of Section 56.2(g), and whether the Notice of Findings is supported by substantial evidence.

(e) If the Petition for Hearing is denied, the Board shall issue a Decision that adopts the findings of the Executive Officer.

(f) If the Petition for Hearing is granted by the Board, the Board shall issue a resolution rejecting the findings of the Executive Officer and assigning the matter to an administrative law judge, who shall conduct an evidentiary hearing in accordance with

Board standards and issue a Proposed Decision for the Board's review and consideration.

(g) The Board may, in its sole discretion, adopt, reject, or modify the Proposed Decision. If the Board rejects the Proposed Decision, the parties shall be afforded an opportunity to present written and/or oral argument to the Board at a date, time and location designated by the Board, after which time the Board shall issue its own decision concerning the matter.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Sections 8547.8 and 19683, Government Code.

§ 56.4. Petition for Hearing by Respondents Before the Board.

(a) If the Notice of Findings finds misconduct by the appointing authority or by a supervisor, manager, or other state civil service employee, the appointing authority, supervisor, manager, or other state civil service employee may file a Petition for Hearing before the Board.

(b) Any appointing authority, supervisor, manager, or other state civil service employee desiring to file a Petition for Hearing under this Section must file a written petition with the Executive Officer and serve a copy of the Petition for Hearing on each party to the initial complaint within **30** days of service of the Notice of Findings. The Petition for Hearing must include the Notice of Findings and have attached a Proof of Service indicating that the appointing authority, supervisor, manager, or other state civil service employee has served a copy of the Petition for Hearing on each party to the complaint.

(c) Upon timely receipt of any Petition for Hearing filed pursuant to this section, and upon determination that the Petition conforms to the requirements of subsection (b) of this section, the matter shall be assigned to an administrative law judge, who shall conduct an evidentiary hearing in accordance with Board standards and issue a Proposed Decision for the Board's review and consideration.

(d) The Board may, in its sole discretion, adopt, reject, or modify the Proposed Decision. If the Board rejects the Proposed Decision, the parties shall be afforded an opportunity to present written and/or oral argument to the Board at a date, time and location designated by the Board, after which time the Board shall issue its own decision concerning the matter.

(e) Any Decision issued by the Board in accordance with this section shall be deemed a final decision of the Board, and the individual against whom any disciplinary action is taken as a result of that Decision shall not have any right of further appeal to the Board concerning that action, with the exception of a Petition for Rehearing.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Sections 8547.8 and 19683, Government Code.

§ 56.5. Decision Adopting the Notice of Findings.

(a) If no appeal is received pursuant to the provisions of Sections 56.3 or 56.4, the Board shall, within 60 days of service of the Notice of Findings, issue a Decision adopting the Notice of Findings as its own decision in the case and ordering those remedies, if any, that are set forth in the Notice of Findings.

(b) Any Decision issued by the Board pursuant to this section shall be deemed a final decision of the Board and the individual against whom any disciplinary action is taken as a result of that Decision shall not have any right of further appeal to the Board concerning that action, with the exception of a Petition for Rehearing.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Sections 8547.8 and 19683, Government Code.

§ 56.6. Disciplinary Action for Proven Retaliatory Acts

(a) In those cases where the Board issues a Decision that finds that any manager, supervisor, or other state civil service employee has engaged in improper retaliatory acts, the Board shall Order the appointing authority to place a copy of the Board's Decision in that individual's Official Personnel File. The Decision shall set forth the legal causes for discipline under Section 19572, and a statement of the penalty

imposed on the individual. The appointing authority shall place the Decision in the individual's Official Personnel File within 30 days of the issuance of the Board's Order and shall also, within that same time period, notify the Office of the State Controller of the disciplinary action taken against the individual. The appointing authority shall also, within 40 days of the issuance of the Board's Order, notify the Board that it has complied with the provisions of this section.

(b) Any Decision, as described in subsection (a), shall be deemed a final decision of the Board and the individual against whom the disciplinary action was taken shall not have any further right of appeal to the Board concerning that action, with the exception of a Petition for Rehearing.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Sections 8547.8 and 19683, Government Code.